JUL 27 2009

Docket No. 09-1527

IN THE SUPREME COURT OF THE UNITED STATES

John S. Karls
Petitioner
v.
The Goldman Sachs Group, Inc., et. al.
Respondents

John S. Karls
Petitioner
v.
Citicorp of North America, Inc., et. al.
Respondents

John S. Karls
Petitioner
v.
ING Financial Holdings Corporation, et. al.
Respondents

On Petition for Writ of Certiorari to the
U.S. Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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I. Questions Presented For Review

A. Are Goldman Sachs, et. al., correct in their Brief in Opposition that the Unconstitutional Denial of Due Process by the U.S. District Court can be made to vanish through the simple application of a false label?

B. Are Goldman Sachs, et. al., correct in their Brief in Opposition that the Unconstitutional Denial of Due Process by the three-judge Ninth Circuit panel can be made to vanish through the simple application of a false label?

C. Does the historically-classic tort, conversion of a trade secret, rest on precisely the same theoretical basis as conversion of fine art such as "The Mona Lisa" which is also nothing more than an idea (or artist's concept) that cannot exist "separate and apart from the property in the paper on which it is written, or the physical substance in which it is embodied" – meaning that denial of conversion status for a trade secret meeting the classic American common-law test for conversion constitutes an Unconstitutional Denial of Equal Protection of the Law for an estimated 10 million American inner-city children for whose education the value of the admittedly-stolen trade secret was dedicated when compared, for example, to heirs of Holocaust victims whose fine art was stolen by the Nazis upon discovery of the current holder of the art?

D. Are Goldman Sachs, et. al., correct in their Brief in Opposition that neither the Unconstitutional Denial of Due Process by both the U.S. District Court and the Ninth Circuit, nor the Unconstitutional Denial of Equal Protection of the Law comprise a "cognizable reason why this Court should depart from its standards to grant certiorari" when the oath of each Member of the Court is to "do equal right to the poor and to the rich" – and the victims of the unconstitutional actions in this case, an estimated 10 million American inner-city children, are among the poorest and least powerful members of American society?

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2 Melvin F. Jager, *Trade Secrets Law, Ch. 50: The Trade Secrets Law of New York* (West Publishing Company – Looseleaf © 2010) 8

Restatement (First) of the Law (Torts), § 757-759 8

Statement Of Facts Material To The Questions Presented For Review In This Reply Brief

These three actions are for the classic tort of common-law conversion of a trade secret, from which evolved the additional common-law tort of misappropriation of trade secrets.

The classic tort of common-law conversion of a trade secret rests on the same principle that governs the application of common-law conversion to fine art such as Leonardo da Vinci's "Mona Lisa" – whether the idea (aka artist's concept) cannot exist "separate and apart from the property in the paper on which it is written, or the physical substance in which it is embodied." *Italiani v. Metro-Goldwyn-Mayer Corporation,* 45 Cal.App.2d 464, 466, 114 P.2d 370 (3rd Dist. 1941) quoting 13 Corpus Juris, p. 948, sec. 5-a; *Accord,* 18 Am.Jur.2d *Conversion § 7: Tangible and Intangible Property, Generally* (2010).

Barclays Capital Ltd. has admitted in unprivileged communications that it stole Petitioner's trade secret and that 15 international financial institutions acquired the trade secret from Barclays Capital Ltd. under conditions of confidentiality, including Goldman Sachs, et. al., in these three actions.

Since the tort of common-law conversion permits the owner to proceed against either the thief or the current holder (the classic example would be the heirs of Holocaust victims whose fine art was stolen by the Nazis), the Petitioner sued the 15 international financial institutions in California Superior Court (San Francisco).

Goldman Sachs, et. al., fled to U.S. District Court (ND Cal.), on diversity grounds since the

defendants in all three actions were headquartered in New York City.

Of the other 12 cases that remained in state court:

- *Karls v. Wachovia Trust Company of California, et. al.* (Ca. Sup. Ct. No. 487535, Cal. Ct. App. No. 126669) and *Karls v. Wells Fargo & Company* (Cal. Sup. Ct. No. 486175, Cal. Ct. App. No. 126671) are pending in the California Court of Appeals (First District) and are scheduled for hearing on August 4, 2010.
- 7 financial institutions, *ABN AMRO, AIG/AIU, Bank of America, Bear Stearns, HSBC Bank, JP Morgan Chase,* and *Merrill Lynch,* agreed last fall with the Petitioner to a stay of proceedings in California Superior Court (San Francisco) pending a final disposition of the appeals in *Wachovia* and *Wells Fargo.*
- 1 financial institution, *BNP Paribas,* settled with the Petitioner on December 21, 2009.
- 2 financial institutions, *Mellon Financial Corporation* and *The Bank of New York,* refused to enter into stays, but their actions are still effectively governed by the final disposition of the appeals in *Wachovia* and *Wells Fargo.*

Argument

A. Re: First Question Presented For Review In This Reply Brief: Are Goldman Sachs, et. al., correct in their Brief in Opposition that the Unconstitutional Denial of Due Process by the U.S. District Court can be made to vanish through the simple application of a false label?

In two of the 12 virtually-identical actions remaining in state court, the California Superior Court expert on intellectual property, Judge Curtis E.A. Karnow, granted the pre-trial motions to dismiss in *Karls v. Wachovia Trust Company of California, et. al.* (Ca. Sup. Ct. No. 487535, Cal. Ct. App. No. 126669) and *Karls v. Wells Fargo & Company* (Cal. Sup. Ct. No. 486175, Cal. Ct. App. No. 126671) on the grounds: (1) actions for common-law conversion are preempted by federal copyright law, and (2) an idea cannot be the subject of common-law conversion despite meeting the classic test of being unable to exist "separate and apart from the property in the paper on which it is written, or the physical substance in which it is embodied" – even though he was well aware that appeal would lie with the California Court of Appeal (First District) and that both positions were diametrically opposed to that court's decision in *Gladstone,* 203 Cal.App.3d 977, 250 Cal.Rptr. 372 (1st Dist. 1988).

Moreover, Judge Karnow's orders (Petition Appendix, pp. 39a–42a) granted the pre-trial motions to dismiss without leave to amend on the grounds that amendment would be futile – even though he was well aware that the separate tort of

"misappropriation of trade secrets" does not require that the secret have any corporeal existence and is not preempted by federal copyright law.

The only explanation for such seemingly-bizarre behavior is that Judge Karnow wanted to compel a "pre-packaged appeal" to the California Court of Appeal (First District) of these issues to ascertain whether it would re-affirm its decision in *Gladstone, supra,* before the California Superior Court invested its time in trying the 12 cases that then remained in state court.

Accordingly, it would have been crucial to explain this to U.S. District Court Judge Jeffrey S. White in transmitting to him copies of Judge Karnow's decisions pursuant to Civil L.R. 7-3(d).

However, Petitioner's transmittal stated that since briefing had been completed on the pre-trial motions of Goldman Sachs, et. al., Civil L.R. 7-3(d) did not permit any comment on the decisions.

In violation of Civil L.R. 7-3(d), Goldman Sachs, et. al., later made voluminous comments regarding Judge Karnow's decisions in the course of transmitting another set of copies of the decisions.

Rather than rejecting the illegal comments of Goldman Sachs, et. al., Judge White promptly cancelled the hearing, which would have been the Petitioner's only opportunity to comment on the obvious intent of Judge Karnow's decisions, and granted the pre-trial motions of Goldman Sachs, et. al., to dismiss without leave to amend. His decisions (Petition Appendix, pp. 7a-21a) do not even discuss the classic tort of conversion of a trade secret or even mention *Gladstone, supra.* (It should be noted that Judge White made an erroneous finding of "fact" that the trade secret was not secret, even though his

finding was not supported by a scintilla of evidence, and was flatly contradicted by the Complaint and Wall Street Journal article attached to the Complaint.)

In the Brief in Opposition to the Petition for Certiorari, Goldman Sachs, et. al., do not deny that Judge White's actions would have constituted an Unconstitutional Denial of Due Process if the voluminous comments of Goldman Sachs, et. al., had comprised "argument" which is prohibited by Civil L.R. 7-3(d).

Instead, Goldman Sachs, et. al., merely claim that the "illegal supplemental brief does not exist." Brief in Opposition, p. 4, emphasis added.

Civil L.R. 7-3(d) prohibited the submission of any additional "argument" once briefing had been completed.

Merely labeling the voluminous comments of Goldman Sachs, et. al., as something other than a "brief" does not change the character of the voluminous comments as argument. If the voluminous comments were not intended to influence Judge White, then why were they submitted?

B. Re: Second Question Presented For Review In This Reply Brief: Are Goldman Sachs, et. al., correct in their Brief in Opposition that the Unconstitutional Denial of Due Process by the three-judge Ninth Circuit panel can be made to vanish through the simple application of a false label?

Pursuant to Federal Rules of Appellate Procedure 35, Petitioner filed solely a "Petition for

Rehearing En Banc" even though FRAP 35(a) states that such a Petition "is not favored." Even though FRAP 35(f) mandates a vote on the Petition if any Ninth Circuit Judge calls for a vote, the original three-judge panel illegally seized control of the Petition and rendered FRAP 35(f) a nullity by preventing any other Ninth Circuit Judge from even seeing the Petition under the "fig leaf" of re-construing the Petition as a mere "motion" and then dismissing the "motion" under a local rule. (Petition Appendix, pp. 4a-6a.)

Since FRAP 35(f) accords the aggrieved party filing a Petition for Rehearing En Banc the right to have every Circuit Court Judge receive the Petition in order to be in a position to call for a vote, the nullification of that right comprises an Unconstitutional Denial of Due Process of Law.

Goldman Sachs, et. al., simply argue that it is proper to construe a "Petition for Rehearing En Banc" as nothing more than a "motion" that can then be dismissed by the original three-judge panel pursuant to a local rule.

It is an Unconstitutional Denial of Due Process to mislabel a FRAP 35 Petition as a "motion" in order to deny Petitioner the right under FRAP 35(f) to have every Circuit Court Judge receive the Petition.

C. Re: Third Question Presented For Review In This Reply Brief: Does the historically-classic tort, conversion of a trade secret, rest on precisely the same theoretical basis as conversion of fine art such as "The Mona Lisa" which is also nothing more than an idea (or artist's concept) that cannot exist

"separate and apart from the property in the paper on which it is written, or the physical substance in which it is embodied" – meaning that denial of conversion status for a trade secret meeting the classic American common-law test for conversion constitutes an Unconstitutional Denial of Equal Protection of the Law for an estimated 10 million American inner-city children for whose education the value of the admittedly-stolen trade secret was dedicated when compared, for example, to heirs of Holocaust victims whose fine art was stolen by the Nazis upon discovery of the current holder of the art?

1 Melvin F. Jager, *Trade Secrets Law, Ch. 2: The Historical Development of Trade Secret Concepts* (West Publishing Company – Looseleaf © 2010) can be summarized as follows:

1. Until the mid-1800's, trade secrets were only protected by common-law conversion actions or contract-enforcement actions.
2. Because of the importance of protecting trade secrets, there evolved since the mid-1800's in both England and the United States a new tort commonly called "misappropriation of trade secrets" to protect trade secrets that were not protected by contract and that did not meet the standard for common-law conversion that the trade secret could not exist "separate and apart from the property in the paper on which it is written, or the physical substance in which it is embodied."

3. This evolution was reflected in the *Restatement (First) of the Law (Torts), §§ 757-759.*
4. These sections were omitted from the Restatement of Torts, 2d (1978), causing the National Conference of Commissioners on Uniform State Laws to propose in 1979 the Uniform Trade Secrets Act.
5. The Uniform Trade Secrets Act has not been adopted in any form by the State of New York and, accordingly, trade secrets are still protected in New York by a contract-enforcement action, or a classic common-law conversion action, or a common-law action for misappropriation of a trade secret, or all three – as amplified in 2 Melvin F. Jager, *Trade Secrets Law, Chapter 50: The Trade Secrets Law of New York* (West Publishing Company – Looseleaf © 2010).
6. The Uniform Trade Secret Act, unlike the classic common-law conversion action, excuses a current holder who does not "know or [has] reason to know" that the trade secret was stolen. In the typical case, the current holder is a competitor of the rightful owner of the secret and the actual thief is an individual whose income and assets are paltry in comparison to the economic damage that has been caused. Accordingly, various federal statutes make theft of a trade secret a crime.

With regard to the third point, in *Karls v. The Bank of New York, et. al.* (Cal. Sup. Ct. No. 489460, Cal. Ct. App. No. A127444), one the 12 nearly-identical lawsuits which remain in state court and one of only two that were not stayed pending final

disposition of the appeals in *Wachovia, supra,* and *Wells Fargo, supra,* the Defendants demurred following the earlier decisions by Judge Karnow and Judge White and raised the issue of preemption under the California Uniform Trade Secrets Act, citing Cal. Civil Code § 3426.7. The Petitioner pointed out that his trade secret was stolen in the U.K. by a U.K. citizen and a U.K. corporation, that when the U.K. corporation transmitted the trade secret to The Bank of New York the transmittal occurred in either the U.K. or New York, and that neither the U.K. nor New York has adopted the American Uniform Trade Secrets Act. The Bank of New York conceded this "choice of law" issue in oral argument in the California Superior Court and in its answering brief in the California Court of Appeal. Accordingly, under *Erie Railroad v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), these concessions should be binding on Goldman Sachs, Citicorp and ING, all of whom are headquartered in New York City.

The standard for a classic common-law conversion action is:

> An idea (including an artist's concept) that cannot exist "separate and apart from the property in the paper on which it is written, or the physical substance in which it is embodied" *Italiani v. Metro-Goldwyn-Mayer Corporation,* 45 Cal.App.2d 464, 466, 114 P.2d 370 (3rd Dist. 1941) quoting 13 Corpus Juris, p. 948, sec. 5-a; *Accord,* 18 Am.Jur.2d *Conversion § 7: Tangible and Intangible Property, Generally* (2010).

Indeed, a more recent case was decided by the California Court of Appeal (First District) which

originally had appellate jurisdiction over all 15 of Petitioner's lawsuits and still does except for the three actions that are the subject of this Petition and the one that was settled on December 21, 2009. *Gladstone v. Hillel,* 203 Cal.App.3d 977, 250 Cal.Rptr. 372 (1st Dist. 1988) held in line with the authorities cited above that an "idea" or "artist's concept" was a proper subject for common-law conversion where the molds of a designer of fine jewelry had been stolen. *Gladstone* further held that a proper remedy for conversion included not only the return of the stolen molds, but also that all new molds made from the stolen molds and all jewelry made from any of the molds had to be destroyed or given to the Plaintiff.

The only authority that Respondents, the U.S. District Court and the Ninth Circuit Court of Appeals have been able to cite are dicta in two cases whose results are easily reconcilable on a factual basis with the well-settled principles just described:

- *Minniear v. Tors*, 266 Cal.App.2d 495, 72 Cal.Rptr. 287 (2nd Dist. 1968) involved a mere bullet-point "idea" in an outline and the bullet-point "idea" could "exist separate and apart from the paper on which it was written."
- *Melchior v. New Line Productions*, 106 Cal.App.4th 779, 131 Cal.Rptr. 482 (2nd Dist. 2003) involved a plaintiff's "idea" for a motion picture that was never even written down by the plaintiff who admitted that the script was authored by someone else.

The abolishment of the classic tort of common-law conversion of a trade secret in New York and the other states that have not adopted the Uniform Trade Secrets Act by U.S. District Court and the

Ninth Circuit panel raises the "Unconstitutional Denial of Equal Protection of the Law" issue:

- Are U.S. District Court and the Ninth Circuit abolishing the classic standard for common-law conversion only for trade secrets, or are they abolishing the classic standard for all ideas including fine art and fine jewelry?
- If they are only abolishing the classic common-law conversion standard for trade secrets, then why isn't their discriminatory abolishment an Unconstitutional Denial of Equal Protection of the Law for the estimated 10 million American inner-city children for whose education the admittedly-stolen trade secret was dedicated?

D. Re: Fourth Question Presented For Review In This Reply Brief: Are Goldman Sachs, et. al., correct in their Brief in Opposition that neither the Unconstitutional Denial of Due Process by both the U.S. District Court and the Ninth Circuit, nor the Unconstitutional Denial of Equal Protection of the Law comprise a "cognizable reason why this Court should depart from its standards to grant certiorari" when the oath of each Member of the Court is to "do equal right to the poor and rich" – and the victims of the unconstitutional actions in this case, an estimated 10 million American inner-city children, are among the poorest and least powerful members of American society?

The oath for a U.S. Supreme Court Justice is specified in 28 U.S. Code § 453 which provides:

> "Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, ------, do solemnly swear (or affirm) that I will administer justice without respect to persons, and **do equal right to the poor and to the rich**, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ------ under the Constitution and laws of the United States. So help me God.'" (emphasis added)

Accordingly, even if Goldman Sachs, et. al., are correct that this Court should turn a blind eye to the Unconstitutional Denials of Due Process perpetrated by both the U.S. District Court and the Ninth Circuit Court of Appeals, the oath for a Supreme Court Justice to "do equal right to the poor and to the rich" mirrors the requirement of the U.S. Constitution of "Equal Protection Of The Law" that was found to apply to the Federal Government in *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

Even if Goldman Sachs, et. al., are correct that the U.S. Supreme Court should not be concerned with Unconstitutional Denials of Due Process and an Unconstitutional Denial of Equal Protection Of The Law, each Supreme Court Justice should still be concerned about her/his oath of office to "do equal right to the poor and to the rich."

Conclusion

For the reasons stated above, it is respectfully requested that the granting by the U.S. District Court (ND Cal.) of Respondents' Motions to Dismiss be reversed, and the actions be remanded to the U.S. District Court (ND Cal.) for further proceedings consistent, pursuant to *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), with the final disposition of the appeals in *Karls v. Wachovia Trust Company of California, et. al.* (Cal. Ct. App. No. 126669) and *Karls v. Wells Fargo & Company* (Cal. Ct. App. No. 126671).

Respectfully submitted,

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